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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. WALTER R. LINARES, Defendant and Appellant.	B287038 (Los Angeles County Super. Ct. No. BA426622)

APPEAL from a judgment of the Superior Court of Los Angeles County, Renee F. Korn, Judge. Affirmed in part, reversed in part, remanded with instructions.

Brad Kaiserman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Walter Linares appeals from a judgment entered after a jury found him guilty of two counts of robbery, one count of possession of a firearm by a felon, and three counts of dissuading a witness, together with true findings on various firearm and gang enhancements. On appeal, Linares challenges the sufficiency of the evidence to support the jury's true finding on his gang enhancement and contends the trial court committed a variety of sentencing errors. We affirm Linares's conviction, but reverse as to the trial court's imposition of prior serious felony enhancements under Penal Code section 667, subdivision (a)[1] and order the clerk of the superior court to amend the abstracts of judgment.

BACKGROUND

Shortly before 11:00 p.m. on June 24, 2014, cameras recorded Linares approaching a mobile taco stand at the corner of Olympic Boulevard and Mirasol Street. Linares ordered three tacos from Juan Bernal, who was running the stand. After he received his tacos, Linares complained to Bernal about the amount of meat on them. Bernal refunded Linares for his meal. During their interaction, Linares asked Bernal if Bernal knew "who runs the neighborhood," and who Bernal pays "taxes" to.

The video showed Linares returning to his vehicle and talking to his passenger, Katherynne Turcios. Linares donned a baseball cap with the letters "VNE" on it, and approached the taco stand's open rear door. Brandishing a firearm, Linares told Bernal words to the effect of, "I run this neighborhood." Linares demanded Bernal's wallet and the money in the taco stand's cash

[1] Further references are to the Penal Code unless otherwise noted.

register. Linares also took money from Luis Flores, a customer at the taco stand.

Turcios had moved from the passenger's seat of the car to the driver's seat and repositioned the car; Linares told Bernal, Flores, and Angel Guzman (Bernal's taco stand employee) "snitches get stitches and bullets, too," and got into the waiting car. Linares fired the gun twice at the taco stand as Turcios drove away, hitting the stand with one of the shots. Shortly after driving away from the taco stand, Turcios drove the car into an intersection and was involved in a collision. Turcios and Linares fled on foot and police apprehended them shortly thereafter.

At trial, a gang expert testified that both Turcios and Linares are members of a street gang known as Varrio Nueva Estrada (VNE).

The People filed an information on July 16, 2015, charging Linares with two counts of robbery (count 1 for Bernal and count 2 for Flores) under section 211, one count of possession of a firearm by a felon (count 6) under section 29800, subdivision (a)(1), and three counts of dissuading a witness (count 7 for Bernal, count 8 for Flores, and count 9 for Guzman) under section 136.1, subdivision (a)(1).[2] The information also alleged that counts 1, 2, 7, 8 and 9 were committed "for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal

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[2] During argument regarding jury instructions (after the parties rested, but before closing argument), the trial court granted the People's motion to amend the information to conform to proof to reflect that counts 7, 8, and 9 charged Linares with violations of section 136.1, subdivision (b)(1) rather than (a)(1).

conduct by gang members" under section 186.22, subdivision (b)(1)(C).[3]

The last page of the information contained the following two paragraphs:

"It is further alleged that prior to the commission of that offense or offenses alleged in Counts one, two, five, and six, the defendant, WALTER RUMALDO LINARES had been convicted of the following serious and/or violent felonies, as defined in Penal Code section 667(d) and Penal Code section 1170.12(b), and is thus subject to sentencing pursuant to the provisions of Penal Code section 667(b)-(j) and Penal Code section 1170.12 . . . ." That paragraph was followed by a single allegation of a violation of section 211 with a conviction date of March 24, 2011 in Los Angeles Superior Court case No. BA375351.

"It is further alleged, that prior to the commission of the offense or offenses alleged in Counts 1, 2, 5, 7, 8, and 9, the defendant, WALTER RUMALDO LINARES had been convicted of the following two or more serious and/or violent felonies, as defined in Penal Code section 667(d) and Penal Code section 1170.12(b) . . . ." That paragraph was followed by two allegations of violations of section 211 with a conviction date of March 4, 2011 in Los Angeles Superior Court case No. BA375351. Linares pled not guilty and the case proceeded to trial.

Following trial, the jury returned a verdict on March 9, finding the defendant guilty on all counts, and finding true all of the firearm and gang enhancement allegations. At a court trial

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[3] Linares was also charged with attempted carjacking under sections 664 and 215, subdivision (a), and leaving the scene of an accident under Vehicle Code section 20001, subdivision (a). Those charges were dismissed before trial.

on Linares's prior convictions, the trial court found that Linares had been convicted of two separate counts under section 211 on March 24, 2011.

Linares moved pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) and section 1385 to strike one of Linares's prior strike convictions and the gang enhancement, and to run sentencing on all charges concurrently. The trial court denied all of Linares's requests.

On December 5, 2017, the trial court sentenced Linares. For counts 1 and 2, the trial court selected the high term of five years, added 20 years for the firearm enhancement, added 10 years for the gang enhancement, and a five year prior serious felony enhancement under section 667, subdivision (a) for a minimum term of 40 years under the "Three Strikes" law and an additional determinate term of 20 years for the firearm enhancement and five years for the prior serious felony enhancement.[4] (§§ 213, subd. (a)(2), 12022.53, subd. (c), 186.22, subd. (b)(1)(C), 667.5, subd. (c)(9), 667, subd. (a), 1170.12, subd. (b)(2)(A)(iii).) The total sentence was 40 years to life plus 25 years for each of counts 1 and 2. On count 6, the trial court sentenced Linares to six years in state prison, stayed pursuant to section 654. On each of counts 7, 8, and 9, the trial court sentenced Linares to 25 years to life plus five years for the prior serious felony enhancement under section 667, subdivision (a),

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[4] The trial court erroneously stated on the record that the minimum term for the indeterminate sentence was based on a 25 year firearm enhancement, which would have made the minimum term of each of counts 1 and 2 45 years. The trial court's minute order and the abstract of judgment, however, correctly reflect the 20 year term required by section 12022.53, subdivision (c), making the minimum term 40 years.

but stayed the sentence on counts 7 and 8 under section 654. Noting that Linares's sentence was for life, the trial court did not impose the gang enhancements, but noted that Linares would have a minimum parole eligibility of 15 years under section 186.22, subdivision (b)(5). Linares's total sentence on all counts was 105 years to life plus 55 years.

Linares filed a timely notice of appeal.

DISCUSSION

A There is sufficient evidence to support the jury's gang enhancement finding

Linares contends the jury's true finding on the gang enhancement is not supported by sufficient evidence for two reasons. First, he contends, there is insufficient evidence to support the gang expert's opinion that VNE is a criminal street gang as that term is used in section 186.22. Second, according to Linares, there is insufficient evidence to support a finding that Linares's crimes were committed "for the benefit of, at the direction of, or in association with" VNE or "with the specific intent to promote, further, or assist in any criminal conduct by gang members." We disagree.

When an appellant challenges the sufficiency of the evidence to support a jury finding, "we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) "Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or

falsity of the facts on which that determination depends." (*People v. Jones* (1990) 51 Cal.3d 294, 314.) It "is not a proper appellate function to reassess the credibility of the witnesses." (*Id.* at pp. 314-315.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357 (*Zamudio*).)

"The same standard governs in cases where the prosecution relies primarily on circumstantial evidence. [Citation.] We 'must accept logical inferences that the jury might have drawn from the circumstantial evidence.' [Citations.] 'Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt.' [Citations.] Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal." (*Zamudio*, *supra*, 43 Cal.4th at pp. 357-358.)

Linares contends that there is insufficient evidence in the record to support a determination that VNE is a criminal street gang because there is no foundation for the People's gang expert's knowledge about VNE's primary activities. (See *In re Alexander L.* (2007) 149 Cal.App.4th 605, 610-611 (*Alexander L.*).) At trial, Los Angeles Police Department Officer Aldo Quintero testified as one of the People's gang experts. He told the jury about his years of experience—from 2011 through trial—studying Los Angeles street gangs, and speaking with and arresting gang members.

Quintero discussed his assignments that included years of work with gang members from the VNE gang, and his personal knowledge of and encounters with a significant number of VNE's members. After establishing that foundation for Quintero's knowledge about VNE, the People specifically asked—and Quintero specifically answered—about VNE's primary activities.

The evidence elicited about Quintero's gang expertise and his knowledge specifically of VNE is the type of evidence our Supreme Court has said "provided a basis from which the jury could reasonably find" that a gang "met the requirements of subdivision (f) of section 186.22 for a criminal street gang . . . ." (*People v. Gardeley* (1996) 14 Cal.4th 605, 620, disapproved on other grounds in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.) The *Alexander L.* court was critical of the foundation of the expert witness's testimony in that case because "information establishing reliability was never elicited from him at trial." (*Alexander L.*, *supra*, 149 Cal.App.4th at p. 612.) Here, the People *did* elicit that information from Quintero, and his opinion regarding VNE's primary activities therefore consitutes sufficient evidence to support the jury's true finding on the gang enhancement.

Linares also argues that the record contains insufficient evidence that his offenses were committed "for the benefit of, at the direction of, or in association with" VNE or with "the specific intent to promote, further, or assist in any criminal conduct by gang members." We disagree.

Linares's getaway driver and criminal companion, Turcios, was also a VNE member. The evidence in this case reflected Linares's references to "the neighborhood" and who "runs" it, as well as to Bernal's payment of "taxes." Between the time Bernal

refunded Linares for his meal and Linares's demand—at gunpoint—for all of the money in the cash register, Linares donned a baseball cap with the letters "VNE" on it and told his victims that he "run[s] this neighborhood." The evidence in the record is sufficient to support the jury's conclusions both that Linares committed his offenses for the benefit of VNE and with the specific intent to promote criminal conduct by VNE gang members.

B. Pleading and Sentencing Errors

Linares contends that his sentence is inconsistent with the pleadings in four material ways. First, he contends the trial court erred by imposing the section 667, subdivision (a) prior serious felony enhancement because that enhancement was not alleged in the information. Second, he contends that the trial court erred by sentencing this case as a third strike case because, he contends, the information only charged the case as a second strike case. Third, Linares contends that the trial court erred when it sentenced counts 7, 8, and 9 under the Three Strikes law because that sentencing scheme was only alleged as to counts 1, 2, 5, and 6. Fourth, Linares contends that the trial court erred in applying gang enhancements, both to counts 7 and 8, even though Linares's sentence on those counts was stayed under section 654, and to calculate the minimum sentence on the indeterminate term imposed for counts 1 and 2.

1. Section 667, subdivision (a)

Linares contends the trial court erred by using a prior serious felony conviction under section 667, subdivision (a) to calculate the minimum sentence on the indeterminate term on counts 1, 2, and 9, and by separately imposing the five-year serious felony conviction enhancement to the determinate term

on counts 1 and 2. Citing *People v. Nguyen* (2017) 18 Cal.App.5th 260 (*Nguyen*), Linares contends that the enhancement must be struck because even though the facts supporting the enhancement were alleged, section 667, subdivision (a) was *not* cited anywhere in the information.

The People argue that *Nguyen* is distinguishable. Linares was on notice of the enhancement, the People contend, because his counsel mentioned the possibility of a plea deal that included a five-year enhancement. In *Nguyen*, according to the People, that never happened.

We agree with Linares. We do not know whether the defendant in *Nguyen* had heard "five-year prior serious felony enhancement" or similar words before the trial in that case. The operative nucleus of *Nguyen* for our purposes here is its instruction that "every prior serious felony conviction is *necessarily* also a strike prior. [Citations.] Charging language which expressly states that a fact is alleged to invoke one particular statute does not adequately inform the accused that the People will use it to invoke a different statute." (*Nguyen*, *supra*, 18 Cal.App.5th at pp. 266-267.) Where the consequence to the defendant is five additional years of incarceration for each count for which it is alleged, it is not too much to ask that the People invoke section 667, subdivision (a), or, as *Nguyen* related, include some language that clarifies that the inclusion of the allegation serves as an invocation of the prior serious felony conviction enhancement. We will, therefore, strike the section 667, subdivision (a) enhancement from Linares's sentence on counts 1, 2, and 9.

2. Three Strikes Law Allegations

Because of the way the information was pled, Linares (again citing *Nguyen*) makes contentions similar to those he made regarding section 667, subdivision (a) about the People's Three Strikes law allegations. The last page of the information contained the following two paragraphs:

"It is further alleged that prior to the commission of that offense or offenses alleged in Counts one, two, five, and six, the defendant, WALTER RUMALDO LINARES had been convicted of the following serious and/or violent felonies, as defined in Penal Code section 667(d) and Penal Code section 1170.12(b), and is thus subject to sentencing pursuant to the provisions of Penal Code section 667(b)-(j) and Penal Code section 1170.12 . . . ." That paragraph was followed by a single allegation of a violation of section 211 with a conviction date of March 24, 2011 in Los Angeles Superior Court case No. BA375351.

"It is further alleged, that prior to the commission of the offense or offenses alleged in Counts 1, 2, 5, 7, 8, and 9, the defendant, WALTER RUMALDO LINARES had been convicted of the following two or more serious and/or violent felonies, as defined in Penal Code section 667(d) and Penal Code section 1170.12(b) . . . ." That paragraph was followed by two allegations of violations of section 211 with a conviction date of March 4, 2011 in Los Angeles Superior Court case No. BA375351.

Based on those two paragraphs, Linares contends that the case should only have been charged as a second strike case, and not a third strike case (because there is only one strike prior alleged under the specific paragraph that cites "section 667(b)-(j) and . . . section 1170.12 . . ." and *two* listed under the following

paragraph, that cites to "section 667(d) and . . . section 1170.12(b) . . . ."

The critical distinction between the information as it pertains to the section 667, subdivision (a) allegations and the Three Strikes law allegations is that the information specifically invokes the Three Strikes law. Although the allegations invoking sections 667 and 1170.12 are not a model of clarity, the information does allege that the defendant had committed two crimes that constituted strikes prior and that the People intended to prosecute the case under the statutory scheme outlined in sections 667, subdivisions (b) through (j) and 1170.12.

In addition to the inartfully worded allegations in the information, we are also persuaded by the transcript of Linares's preliminary hearing that all parties understood the case to have been charged as a third-strike case. At the preliminary hearing, the prosecutor stated: "[F]or the benefit of the record as to Defendant Linares, so that he knows, I have been informed by my office that this is a third-strike case . . . . So we are going to proceed as a third-strike case. [¶] So [Mr. Linares] is facing 25 years to life regardless . . . ."

It does not appear from the record before us that there could have been any confusion about whether the People intended to charge Linares under the Three Strikes law.

3. Gang Enhancements

Linares contends the trial court erred by imposing gang enhancements to counts 7 and 8 and by using gang enhancements to calculate the minimum sentence on Linares's indeterminate terms on counts 1 and 2. Linares contends that the trial court erred by imposing a gang enhancement to the life sentences on counts 7 and 8, and by using the gang enhancement

to calculate the minimum term on the indeterminate sentences (even though the enhancement was not imposed on the determinate term) for counts 1 and 2.

As to counts 1 and 2, the trial court did not impose the gang enhancement. Rather, it calculated the minimum term of the indeterminate sentence using the gang enhancement, as required by sections 667, subdivision (e)(2)(A)(iii) and 186.22, subdivision (b)(4)(A).

As to counts 7 and 8, the People contend that the trial court misspoke on the record when it purported to impose the gang enhancement, but was in fact adding a section 667 prior serious felony enhancement, as reflected in both the minute order noting Linares's sentence and the abstract of judgment. Citing *People v. Sharret* (2011) 191 Cal.App.4th 859 (*Sharret*), Linares contends that the trial court actually imposed the gang enhancement because "[t]he oral pronouncement of judgment controls over any discrepancy with the minutes or the abstract of judgment." (*Id.* at p. 864.)

Sharret derived that rule from, among other places, the Supreme Court's opinion in *People v. Delgado* (2008) 43 Cal.4th 1059. *Delgado* explained: "Defendant notes correctly that the abstract of judgment is not itself the judgment of conviction, and cannot prevail over the court's oral pronouncement of judgment to the extent the two conflict. [Citations.] However, the abstract is a contemporaneous, statutorily sanctioned, officially prepared clerical *record* of the conviction and sentence. It may serve as the order committing the defendant to prison [citation], and is ' "the process and authority for carrying the judgment and sentence into effect." ' [Citations.] As such, 'the Legislature intended [it] to [accurately] summarize the judgment.' [Citations.] When

prepared by the court clerk, at or near the time of judgment, as part of his or her official duty, it is cloaked with a presumption of regularity and reliability." (*Id.* at p. 1070, original italics.)

Our Supreme Court has also written that resolution of conflicts between a reporter's transcript and a clerk's transcript is not mechanical. " 'It may be said . . . as a general rule that when, as in this case, the record is in conflict it will be harmonized if possible; but where this is not possible that part of the record will prevail, which, because of its origin and nature or otherwise, is entitled to greater credence [citation]. Therefore whether the recitals in the clerk's minutes should prevail as against contrary statements in the reporter's transcript, must depend upon the circumstances of each particular case.' " (*People v. Smith* (1983) 33 Cal.3d 596, 599.)

Our review of the record here reveals two things. First, the trial court misspoke when it imposed a five year enhancement on each of counts 7 and 8 for what it termed a "serious gang allegation." The trial court used the same terminology on counts 7, 8, and 9 (and stayed the sentences on counts 7 and 8) before correcting itself mid-statement when pronouncing sentence on count 9: "And then on count 9 the court is imposing sentence of 25 years to life. That's under option (ii) under 1170.12, plus an additional five years on the gang – *I am sorry, an additional five years on the serious felony conviction prior*, for a total of 25 to life, plus five."

Second, the "serious gang allegation" or "serious gang enhancement" never made it into the trial court's minutes or to the abstract of judgment. There would thus be nothing for us to correct had the trial court actually imposed a gang enhancement on counts 7 and 8.

Because we have already determined that the information did not charge Linares for the five year prior serious felony enhancement, we will strike *that* enhancement from each of the sentences on counts 7, 8, and 9.

For the sentences that the trial court *did* impose (and not stay), it did not impose a gang enhancement, but rather, pursuant to section 186.22, subdivision (b)(5), correctly announced that Linares would not be eligible for parole for a minimum of 15 years. We find no error in the trial court's application of section 186.22 in this case.

C. The trial court did not abuse its discretion by declining to grant Linares's *Romero* motion or to strike gang enhancements

Linares contends the trial court abused its discretion when it ruled on Linares's *Romero* motion by not striking one of Linares's prior strikes. Linares also contends that the trial court abused its discretion by declining to strike gang enhancements pursuant to section 1385.

In exercising its discretion under *Romero* to "strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law," the trial court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [statutory] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) "In exercising its discretion under section 1385, the [trial] court should consider the nature and

circumstances of the defendant's current crimes, the defendant's prior convictions, and the particulars of his or her background, character, and prospects." (*People v. Orabuena* (2004) 116 Cal.App.4th 84, 98.)

The trial court considered the factors it was required to consider when it declined to strike either a prior felony conviction or the gang enhancements. The trial court specifically noted that it had discretion, and that it had used that discretion in the past under appropriate circumstances, but that it was declining to do so in this instance, and it stated a variety of reasons for its decision not to strike either of Linares's prior felony convictions under *Romero*. What the trial court cited as most persuasive was that Linares was released from prison after serving time for robbery and within months committed the additional robberies at issue. "Quite honestly," the trial court said, "Mr. Linares literally turned around from the time he was to be rehabilitated in state prison and came out and chose to go right back into a life of gangs, a life of crime, a life of violence."

"[T]here is no abuse of discretion requiring reversal if there exists a reasonable or fairly debatable justification under the law for the trial court's decision or, alternatively stated, if that decision falls within the permissible range of options set by the applicable legal criteria." (*Cahill v. San Diego Gas & Elec. Co.* (2011) 194 Cal.App.4th 939, 957.) "It is the appellant's burden on appeal to show the trial court abused its discretion." (*Ibid.*) Linares has not done so here; on the record before us, the trial court's decisions not to strike or vacate a prior felony conviction or to strike gang enhancements falls within the court's permissible range of options.

D. Resentencing Under Senate Bill No. 620[5]

Linares argues that we must remand the case to give the trial court the opportunity to exercise its discretion in the first instance to strike the firearm enhancement used to calculate the minimum term of Linares's indeterminate sentences on counts 1 and 2, and also imposed as part of the determinate sentences on both of those counts.

On October 11, 2017 (before Linares was sentenced on December 5, 2017), the Governor signed Senate Bill No. 620 into law. Senate Bill No. 620 amended section 12022.53 to provide that the "court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." (§ 12022.53, subd. (h); Stats. 2017, ch. 632, § 2.)

An amendment to the Penal Code will not generally apply retroactively. (See § 3.) However, an exception applies when the amendment reduces punishment for a specific crime. (See *In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*); accord, *People v. Brown* (2012) 54 Cal.4th 314, 323-324.) Reduction of a punishment indicates the Legislature has "expressly determined

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[5] Linares also requested that we remand for resentencing based on Senate Bill No. 1393. On September 30, 2018, the Governor signed Senate Bill No. 1393 into law. Senate Bill No. 1393 amended sections 667 and 1385 to delete statutory language prohibiting judges from striking enhancements imposed pursuant to section 667, subdivision (a) for prior serious felonies. (§ 667, subd. (a); § 1385, subd. (b); Stats. 2018, ch. 1013, §§ 1 & 2.) Because we struck the applicable prior serious felony enhancements from Linares's sentence, Linares's request that we remand to allow the trial court to determine whether to strike those enhancements is moot.

that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act," and "should apply to every case to which it constitutionally could apply." (*Estrada*, *supra*, at p. 745.) That includes all cases in which the judgment is not yet final as of the effective date of the legislature's sentence reduction. (*Id.* at p. 744.) The exception to nonretroactivity extends to amendments that do not necessarily reduce a defendant's punishment but give the trial court discretion to impose a lesser sentence. (*People v. Francis* (1969) 71 Cal.2d 66, 75-76; see also *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 308.)

The People agree that Senate Bill No. 620 applies to Linares. But the People argue that we need not remand the case because the trial court stated on the record that if it had discretion to strike the firearm enhancement in this case, it would not do so. (See *People v. McVey* (2018) 24 Cal.App.5th 405, 419 (*McVey*).)

At trial, the People anticipated Linares's argument here. Regarding the firearm enhancement, the People requested that the trial court "make a finding at this point that even if the court had discretion at this point that the court would still impose" the firearm enhancement. The trial court responded that it intended to make that finding and ultimately did state on the record that it would not exercise its discretion to strike the firearm enhancement.

"[T]here appears no possibility [from the record] that, if the case were remanded, the trial court would exercise its discretion to strike the enhancement . . . . We therefore conclude that remand in these circumstances would serve no purpose but to

squander scarce judicial resources." (*McVey*, *supra* 24 Cal.App.5th at p. 419.)

E. Errors in the Abstracts of Judgment

The abstract of judgment for counts 1, 2, and 6 reflect two firearm enhancements each for counts 1 and 2, for a total of 40 years, one gang enhancement for each of counts 1 and 2, and two section 667, subdivision (a) enhancements each for counts 1 and 2. The abstract of judgment for counts 7, 8, and 9 reflects a section 667, subdivision (d) enhancement for count 9 that the parties agree (and the reporter's transcript confirms) should be a section 667, subdivision (a) enhancement.

Linares contends that the abstracts of judgment do not correctly reflect Linares's sentence and asks us to correct them. The firearm enhancements, the gang enhancements, and the prior serious felony enhancements were all used to calculate the minimum term of Linares's indeterminate sentence on each of counts 1 and 2. Additionally, the firearm enhancements and the prior serious felony enhancements were imposed as determinate sentences on each of the two counts. The People argue that the abstracts of judgment are correct (mostly—with the exception of the section 667, subdivision (d) enhancement that should be a section 667, subdivision (a) enhancement), but acknowledge that they could be clarified.

We will order the clerk of the superior court to amend the abstracts of judgment in the following manner:

- Delete each of the enhancements attributed to any subdivision of section 667;
- Delete two of the four listed firearm enhancements (one for each of counts 1 and 2) (§ 12022.53, subd. (c));

- Delete the gang enhancements, which were used to calculate the base term of Linares's indeterminate sentences on counts 1 and 2, but were not separately imposed (§ 186.22, subd. (b));
- Revise the entries on lines six and eight on the abstract of judgment for counts 1, 2, and 6 to reflect the correct terms of Linares's sentences of 25 years to life on count 9 and 35 years to life plus 20 years on each of counts 1 and 2, for a total of 95 years to life plus 40 years.

DISPOSITION

The trial court's imposition of prior serious felony enhancements under section 667, subdivision (a) to calculate the minimum term of the defendant's indeterminate sentences and the imposition of those enhancements on the defendant's determinate sentences is reversed. On remand, the trial court is ordered to amend the abstract of judgment consistent with this opinion. The trial court's judgment is affirmed in all other respects.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.